NO. 351653

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STADELMAN FRUIT, LLC,
a Washington limited liability company

Plaintiff / Respondent

v.

JIM D. VOORHIES, a single person; JOHN E. HOWARD, as Personal Representative for the ESTATE OF FLORENCE E. HOWARD,

Defendants / Appellant

BRIEF OF APPELLANT JIM D. VOORHIES

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I. INTRODUCTION

The Yakima Valley is blessed with the ability to grow numerous types of fresh produce for ultimate sale to consumers. One such crop is apples. Defendant (hereinafter "Voorhies") owned and operated a small apple orchard with this purpose in mind.

Unlike apples, money does not grow on trees. Voorhies needed money in order to properly grow his apple crop. Rather than go to a bank to provide that financing, he used fruit packing facilities, such as, Stadelman Fruit, (Plaintiff herein) to provide this financing as well as to store, pack and sell his apples. The financing was provided by way of periodic "advances" of funds which Voorhies then used for various growing expenses. Repayment of the advances was to come from the proceeds generated from the apple crop that was grown and brought to Stadelman Fruit for storage, packing and sale. This same process occurred every year with Stadelman for crop years 2008-2010.[1]

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[1] The term "crop year" is used because the growing of the apple occurs in a "crop year" but the apples harvested usually are stored for months before being packed and sold and the grower credited with the funds from the sale. Crop year is used to refer to the year that the crop is grown and harvested. For instance, for crop year 2008, the apple tree would typically break dormancy and start growing in the spring of the year. The trees would then bloom (creating the apple crop) and that crop would grow and mature over the next six or so months. Harvest typically would be in September – October of the crop year. The

Stadelman Fruit is a fruit storage and packing facility. It does not make its money by advancing growers money to grow the crop, but, rather, makes its money in the packing and storage charges that it then assesses the various growers that bring it fruit, such as Voorhies. The money to pay for those charges are taken directly from the proceeds of the sales of the fruit. Over the three years that Voorhies brought his fruit to Stadelman, it consistently charged Voorhies about $161 per bin of apples for these packing and storage charges. Contrast this with the amounts Voorhies was credited by Stadelman: $14.58 per bin in 2008; $81.80 per bin in 2009 and $ 92.64 per bin in 2010. "Advancements" to growers to grow their crop are an enticement for the grower to bring fruit to Stadelman as opposed to some other fruit and storage packing facility in the Yakima Valley, of which there are many.

Here's how the system works. Voorhies grows and harvests his apples and brings them in bins to Stadelman. Stadelman then stores the bins and will pack and sell them at some time in the future. The proceeds from the sales go to Stadelman. Stadelman then first

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Voorhies' harvested apples were then taken to Stadelman for storage packing and sale. However, that would typically not occur for many months.

deducts its storage and packing charges off the top of the Voorhies sales proceeds. Stadelman gets paid first. The money left over would typically go to the grower but Voorhies had a grower agreement with Stadelman which said that any additional proceeds could be offset for advances made. During the three-year relationship at Stadelman, Voorhies received zero dollars from his apple sales proceeds. It all went to Stadelman to pay for storage and packing fees as well as the advances that Stadelman had made to Voorhies.

In crop year 2008, Stadelman advanced $180,400 to Voorhies for the growing and harvesting of the Voorhies apple crop. Stadelman was paid $169,086.49 for apple proceeds associated with the Voorhies 2008 crop of which 100% was paid to Stadelman. This left a deficit of $11,313.51 for crop year 2008. In packing and selling the 2008 Voorhies apple crop, Voorhies was credited with $13,045.69 (which all went to Stadelman) and Stadelman also received $143,491.78 in packing and storage charges from the Voorhies fruit that went directly to Stadelman out of the Voorhies apple sales proceeds. Thus, for crop year 2008, Stadelman accounted for a grand total of $13,045.69 (all

of which was paid to Stadelman) for 895 bins[2] of apples Voorhies brought to it ($14.58/bin) while it paid itself an additional $143,491.78 ($160.33/bin) out of the Voorhies fruit proceeds for its packing and storage charges.

In crop year 2009, Stadelman advanced $226,525 for the growing and harvesting of the Voorhies apple crop. Stadelman was paid $194,286.12 for apple proceeds associated with the 2009 crop of which 100% was paid to Stadelman. This left a deficit of $32,239 for crop year 2009. In packing and selling the 2009 Voorhies apple crop, Voorhies was credited with $194,286.12 (which all went to Stadelman) and Stadelman also received $383,337.26 in packing and storage charges from the Voorhies fruit that went directly to Stadelman. Thus, for crop year 2009, Stadelman accounted for $194,286.12 (all of which was paid to Stadelman) for 2,375 bins of apples Voorhies brought to it ($81.80/bin) while Stadelman paid itself an additional $382,737.26 ($162.41/bin) out of the Voorhies fruit proceeds.

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[2] When apples are harvested they are placed into large, typically wooden, "bins" which are roughly square in shape and hold around 800-900 pounds of apples each.

In crop year 2010, Stadelman advanced $166,511.99 for the growing and harvesting of the Voorhies apple crop. Stadelman credited Voorhies $88,810.74 for apple proceeds associated with the 2010 crop of which 100% was paid to Stadelman. This left a deficit of $77, 701.25. In packing and selling the 2010 Voorhies apple crop, Voorhies was credited with $88,810.74 (which all went to Stadelman) and Stadelman also received $153,155.97 in packing and storage charges from the Voorhies fruit that went directly to Stadelman.

In summary, over the three crop years, Voorhies brought Stadelman Fruit a total of 4,313 bins of apples for it to store, pack and sell. Stadelman Fruit advanced Voorhies a total of $573,436 to accomplish this task. The revenue from the fruit generated $452,183.35 all of which was paid to Stadelman. In addition, Voorhies paid Stadelman Fruit an additional $679,381.26 for storing, packing and selling the Voorhies apples. If you are keeping score at home, that's Voorhies $453,019 (all paid to Stadelman) and Stadelman Fruit $1,132,401.10. That's the background as to how the industry works to put this motion into context.

Turning to the motions themselves, the Voorhies motion should have been granted and the trial court erred in not doing so. There is no debt instrument in this case. The case is governed by the terms of the Grower Agreement. The Grower Agreement signed by Voorhies does not have a provision for repayment of money in the event of a shortfall in funds advanced. The mortgage that Voorhies signed is likewise ineffective and any claim based thereon should be dismissed. The language in the mortgage clearly only applies to advances related to crop year 2008. After crop year 2008 revenue was paid to Stadelman, a deficit of only $11,313.51 remained. There were ample proceeds thereafter to retire that debt. It is undisputed that Voorhies never agreed that the mortgage could or would apply to subsequent years. It was error for the court to deny the motion.

Turning to the Stadelman's motion, Stadelman's motion should be denied for the two reasons set forth above. In addition, at the very least, there are issues of fact as to how accurate the accounting it has rendered to Voorhies actually is. In addition, the motion should be denied since it is fatally flawed in its premise. The mortgage that was granted only covers money that could be associated with crop year

2008. It is undisputed that Stadelman has been provided enough money to cover that $10,000 that remained for crop year 2008. In addition, the grower agreement, by its own terms does not have any provision that requires Voorhies to make up any shortfall that may exist with respect to advancements exceeding fruit proceeds. The Grower agreement allows for an offset and application of all funds associated with the Voorhies fruit to go toward all advances made by Stadelman. It is undisputed that this occurred in this case. Stadelman received every penny of Voorhies' money. Accordingly, the Stadelman's motion should have been denied and Voorhies' motion to dismiss this case should be granted. The trial court erred in its rulings. Finally, issues of fact exist as to the other Voorhies claims as will be discussed below.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in its granting of Stadelman's Motion for Summary Judgment.

Issues Related to Assignment of Error No. 1:

1. (Same as Issue 1 for Assignment of Error No. 2): Does the grower agreement between Stadelman and Voorhies create a

contractual obligation for Voorhies to pay back any deficits that may exist if the proceeds from his apple crop were not sufficient to fully pay Stadelman for all advances?

2. If the grower agreement is capable of creating such an obligation for Voorhies to repay advances, do issues of fact exist as to the interpretation of the grower agreement making the granting of summary judgment inappropriate.
3. Does the mortgage that Voorhies issued in favor of Stadelman secure advances for any year other than 2008?
4. Do any issues of fact exist as to whether Voorhies agreed to any such extension?
5. Do issues of fact exist as to whether Stadelman engaged in unfair or deceptive acts or practices and/or whether those impacted the public interest?
6. Does the independent duty doctrine apply to preclude Voorhies' negligence claims?

Assignment of Error No. 2: The trial court erred in failing to grant Voorhies' motion for summary judgment on these cross motions for

summary judgment since Voorhies was entitled to judgment as a matter of law on these facts presented to the trial court.

Issues Related to Assignment of Error No. 2:

1. (Same as Issue 1 for Assignment of Error no. 1): Does the grower agreement between Stadelman and Voorhies create a contractual obligation for Voorhies to pay back any deficits that may exist if the proceeds from his apple crop were not sufficient to fully pay Stadelman for all advances?
2. (Same as Issue 2 for Assignment of Error No. 1): Does the mortgage that Voorhies issued in favor of Stadelman secure advances for any year other than 2008?

III. STATEMENT OF THE CASE

Jim Voorhies (hereinafter "Voorhies") is a 79 year old, long time orchardist in the Yakima Valley. (CP 359). This lawsuit arises out of Voorhies bringing his apples to Stadelman for crop years 2008, 2009 and 2010. It is undisputed that Voorhies did so. It is further undisputed that Stadelman provided money advancements to Voorhies to enable him to grow the apples on his orchard. This is the only financing option Voorhies had available and he told Stadelman

of this fact. He would not have brought his apples to Stadelman unless Stadelman agreed to finance the growing of his apples. (CP 360-61).

During his life, Voorhies has taken his apples to numerous apple packing houses up and down the Yakima Valley. (CP 359). The process usually works like this. A grower will take his or her fruit to an apple packing house. A grower contract is signed (CP 72-82). The grower agrees to bring all, or a portion of his fruit to the apple packing shed. In this case, Voorhies agreed to bring all of his apples to Stadelman. (CP 72, 74).

The grower agreement provides that Stadelman can (and will) charge Voorhies for the storage and packing of his apples. Those charges are deducted directly from the sales proceeds of the apples (CP 76). Stadelman can also make advancements to Voorhies for the growing of his apples. The repayment of these advances again comes from the apple sales proceeds and Voorhies grants Stadelman an offset right to recover the expense. (CP 76-77).

One of the apple packing houses Voorhies has used over the years is Stadelman. (CP 359). Over the course of his orchard time, Voorhies took his apples to Stadelman on three occasions. (CP 359).

The first time Voorhies took his apples to Stadelman was in 1996. Voorhies took advances from Stadelman in order to finance the growing of his apple crop. (CP 360). Unfortunately, the proceeds advanced by Stadelman were not sufficient to repay the money that Stadelman had advanced to the extent of $100,000. Stadelman did not seek reimbursement of the amount advanced but, rather asked Voorhies to bring three loads of apples the next year. He did so. (CP 360).

Voorhies next brought his apple crop to Stadelman in 1998. Again, Voorhies sought and was advanced money from Stadelman to grow the crop. As with 1996, the revenue derived from the sale of the crop was not sufficient to repay Stadelman for the advances that had been made. Again, Voorhies was told that no such repayment would be required and no lawsuit was brought. (CP 360).

For the next ten years, Voorhies went to other apple packing facilities. In 2008, Voorhies was approached by a representative from Stadelman soliciting him to bring his apples back to Stadelman to store, pack and sell. Voorhies was agreeable to do so but also

specifically agreed with Stadelman that Stadelman would provide the financing to grow his crop. Stadelman agreed to do so. (CP 360-61).

Voorhies did sign a mortgage for his property to secure the 2008 advances. He never agreed to any extension of that mortgage to any advances for crop years after 2008. (CP 361). For crop year 2011, Stadelman refused to advance any funds to grow the Voorhies crop and also told him he could not take his apples to any other apple packing facility. (CP 362).

There are two documents that form the basis for this lawsuit. In fact, those terms and conditions laid out therein control the disposition of this action. At the summary judgment stage, Stadelman spent little time addressing these documents. As will be discussed below, it made perfect sense for Stadelman not to discuss the two documents; neither supports Stadelman's claims it now makes.

The first document is the "Grower Agreement" signed by the parties. The Grower Agreement provides that Voorhies is to bring his apple crop to Stadelman Fruit, beginning in crop year 2008. (CP 72-75). It is undisputed that Voorhies did so.

The term of the agreement was for crop year 2008 but could be renewed for subsequent years:

> 3. TERM: The term of this Agreement is for the 2008 crop year; provided, however, that this Agreement shall be considered as atomically renewed from year to year thereafter, unless either party terminates this Agreement by giving the other party written notice not later than March 1 of the crop year in which termination is desired. In addition, the term of this Agreement shall automatically be extended and shall include all subsequent crop years and crops grown during such crop years until all obligations, including advances, owed by Grower to Handler under the terms of this Agreement have been paid in full unless otherwise determined by Handler. In other words, it is contemplated that so long as Grower is indebted to Handler, Grower will continue to bring Grower's fruit to Handler for the purpose of handling and marketing in order to accommodate Handler's economic interest as a handler and packer of Grower's fruit and for the purpose of protecting Handler's rights as a creditor of Grower.

(CP 75)

The Grower Agreement also has a specific provision dealing with advancements that could be made by Stadelman Fruit to Voorhies:

> 7. ADVANCES: Handler may make discretionary advances to Grower to grow and harvest Grower's fruit crop on such terms and conditions as Handler shall, in its sole discretion, determine to be appropriate. If handler has agreed to make an advance to Grower, Grower hereby agrees to execute any security agreement, promissory note, financing statement, and other documents deemed reasonable and

> necessary by Handler to ensure the repayment of such advances and, in addition, any subordination agreements determined reasonable and necessary by Handler for such purpose. Handler's decision to make advances in any particular instance shall not constitute an obligation or agreement by Handler to provide such advances to Grower in the future, and Grower acknowledges and agrees that such advances are discretionary with Handler.

(CP 77).

In connection with this advancement of funds, Voorhies agreed to execute all security documents requested by Stadelman Fruit:

> 8.2 Security Documents: Grower shall, procure and deliver to Handler or execute for Handler, at is [sic] request, any additional security agreement, financing statement, negotiable warehouse receipt, promissory note for advance of credit given by Handler to Grower, or other writing necessary to create, preserve, protect or enforce Handler's lien and/or security interest in Grower's crops and its rights under state and federal law.

(CP 77).

The Grower agreement also had language related to payments to be made to Stadelman:

> 6.2 Right of Offset: The parties understand and agree that Handler shall have the right to offset all advances, assessments, charges and expenses owed by Grower prior to the payment of any funds to Grower or any third party having an interest in Grower's crops or the proceeds thereof.

(CP 76).

10. PAYMENT AND ACCOUNTING: Handler shall, upon written request by Grower, provide periodic accountings of all Grower's fruit sold to that date, less charges, advances and authorized deductions. Handler shall remit any balance due grower within sixty (60) days after receipt of the proceeds from the sale of Grower's fruit and final accountings have been made and completed; provided, however, that Handler does not guarantee collection on fruit sold, placed, or consigned. In determining whether any balances are owed by Grower, charges, expenses and advances in connection with all fruit subject to this Agreement shall be taken into consideration. Any payments received by Grower from Holtzinger Fruit Company shall be paid to Handler in partial repayment of the sums due Handler under this Agreement. For such purpose, Grower Grants Handler a security interest in such net proceeds pursuant to Paragraph 8 hereof and authorizes Handler to file a UCC 1 financing statement evidencing such security interest.

(CP 80)

13. FAILURE TO DELVER FRUIT: In the event Grower fails to deliver Grower's fruit to Handler in accordance with the terms of this Agreement, Grower shall pay Handler liquidated damages in an amount equal to one hundred twenty percent (120%) of Handler's normal handling and marketing charges that it would have received had Grower delivered the "variety" and "estimated quantity" of fruit shown in paragraph 2.1 of this Agreement. In the alternative and at its sole option, Handler may, in lieu of seeking the liquidated damages referred to above, specifically enforce Grower's obligation to deliver to Handler the fruit which is the subject of this Agreement. The foregoing notwithstanding, it shall not be a default under this Agreement if Grower is unable to deliver

> Grower's fruit to Handler as described and estimated in paragraph 2.1 above due to flood, wind, or other acts of nature or in the event of strikes, fire, embargoes or other conditions beyond Grower's control which interfere with Grower's normal operations.

(CP 81).

The second document that is at issue in this case is a mortgage that was signed by Voorhies in favor of Stadelman Fruit with respect to advances related to the 2008 crop year. This mortgage specifically states that it is given:

> To secure the performance of each agreement of the mortgagor herein contained and the payment of all sums due Mortgagee in providing crop financing for the 2008 crop to be grown upon said premises, including all renewals, modifications, and extensions thereof, and also such additional sums as shall be agreed upon.

(CP 85)

In crop year 2008, Stadelman advanced $180,400 to Voorhies for the growing and harvesting of the Voorhies apple crop. (CP 98). Voorhies was credited (but not told) $169,086.49 for apple proceeds associated with the Voorhies 2008 crop of which 100% was paid to Stadelman. (CP 98, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392). Voorhies was actually only told by Stadelman that the 2008 crop proceeds amounted to $145,120.60. (CP 98). This left a deficit

of $10,477.00 for crop year 2008. In packing and selling the 2008 Voorhies apple crop, Voorhies was credited with $13,045.69 (which all went to Stadelman) and Stadelman also received $143,491.78 in packing and storage charges for the 895 bins of apples Voorhies brought from the Voorhies fruit that went directly to Stadelman out of the Voorhies apple sales proceeds. (CP 98, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392). Thus, for crop year 2008, Stadelman accounted for a grand total of $13,045.69 in apple sales proceeds (all of which was paid to Stadelman) for 895 bins of apples Voorhies brought to it ($14.58/bin) while it paid itself an additional $143,491.78 ($160.33/bin) out of the Voorhies fruit proceeds for its packing and storage charges.

In crop year 2009, Stadelman advanced $226,525 for the growing and harvesting of the Voorhies apple crop. (CP 98). Voorhies was credited $194,286.12 for apple proceeds associated with the 2009 crop of which 100% was paid to Stadelman. (CP 98-99). This left a deficit of $32,239 for crop year 2009. In packing and selling the 2009 Voorhies apple crop, Stadelman also was assessed $383,337.26 in packing and storage charges for the Voorhies 2,375

bins of apples brought to Stadelman, the proceeds of which, went directly to Stadelman. (CP 402, 404, 406, 408, 410, 411-12, 415-16, 418, 413-14, 400). Thus, for crop year 2009, Stadelman accounted proceeds to Voorhies of $194,286.12 (all of which was paid to Stadelman) for 2,375 bins of apples Voorhies brought to it ($81.80/bin) while Stadelman paid itself an additional $382,737.26 ($161.15/bin) out of the Voorhies fruit proceeds.

In crop year 2010, Stadelman advanced $166,511.99 for the growing and harvesting of the Voorhies apple crop. (CP 98-99). Stadelman credited Voorhies $83,651.3 for apple proceeds associated with the 2010 crop of which 100% was paid to Stadelman. (CP 99). This left a deficit of $77,701.25. In packing and selling the 2010 Voorhies apple crop, Stadelman also received $153,155.97 in packing and storage charges from the 903 bins of Voorhies apples that went directly to Stadelman. (CP 430-34, 422, 424-28). Thus, for crop year 2010, Stadelman accounted proceeds to Voorhies of $83,651.71 (all of which was paid to Stadelman) for 903 bins of apples Voorhies brought to it ($92.64/bin) while Stadelman paid itself an additional $153,155.97 ($169.61/bin) out of the Voorhies fruit proceeds.

On March 10, 2017, the trial court entered an order granting Stadelman's motion for summary judgment and denying Voorhies' motion for summary judgment and ordering judgment and decree of foreclosure on the mortgage. (CP 572-79). This appeal follows. (CP 580).

With this factual background in mind, we turn next to the arguments focused on the actual language in the two controlling documents that set forth the rights and obligations of the parties and not the conclusory statements of Stadelman as to what has occurred in this case.

IV. ARGUMENT

A. Standards Applicable to Summary Judgment.

In a summary judgment motion, the moving party has the initial burden of showing the absence of an issue of material fact. This burden can be met by showing that there is an absence of evidence supporting the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc.,* 112 Wash.2d 216, 225-26, 770 P.2d 182 (1989).

The moving party must still, however, identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Baldwin v. Sisters of Providence, Inc.,* 112 Wash.2d 127, 132, 769 P.2d 298 (1989). If the moving party does not meet this initial burden, summary judgment may not be entered, regardless of whether the opposing party submitted responding materials. *Jacobsen v. State,* 89 Wash.2d 104, 108, 569 P.2d 1152 (1977); see also *Baldwin,* 112 Wash.2d at 132, 769 P.2d 298.

With respect to Stadelman's motion, it is the moving party and has not met its burden to identify the portions of the pleadings, depositions, answers to interrogatories, and admissions which demonstrate the absence of a genuine issue of material fact. Having failed to meet their initial burden, this Court should reverse the trial court order granting Stadelman's motion.

Even if the moving party meets its initial burden, the opposing party may then set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. The moving party

is entitled to summary judgment only when there is a "complete failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial." *Cho v. City of Seattle,* 185 Wn.App. 10, 15, 341 P.3d 309 (2014) review denied, 183 Wn.2d. 1007 (2015) (quoting *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). On a motion for summary judgment, the court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

As can be seen, where issues of fact are present, the motion for summary judgment should be denied. While it is not impossible for issues of fact to be decided on a summary judgment motion, it is indeed difficult. Issues of fact can be determined as a matter of law on a summary judgment motion only when reasonable persons could reach only one conclusion from those facts. *See Moore v. Blue Frog Mobile, Inc.,* 153 Wn. App. 1, 6-7, 221 P.3d 913 (2009). The Court's function on summary judgment is to determine whether genuine issues of material fact exist. The Court's job at this stage is not to judge

or resolve those factual issues. *See Jones v. Dep't of Health*, 140 Wn. App. 476, 487, 166 P.3d 1219 (2007).

In addition, issues of fact can only be decided on a summary judgment motion, "if the facts and inferences from them are plain and not subject to reasonable doubt or difference of opinion." *Martini v. Post*, 178 Wn. App. 153, 164-65, 313 P.3d 473 (2013). Where different inferences can be drawn from the facts presented as to ultimate issues of fact, such as "knowledge", summary judgment is inappropriate. See *Aduddell v. John Manville Corp.,* 42 Wn. App. 204, 207, 709 P.2d 822 (1985). A showing at the summary judgment stage of the proceeding may not be sufficient for trial. However, that's not the issue presented in the summary judgment motion.

While this might not be sufficient proof of a breach for purposes of trial, it is sufficient at this stage of the proceedings. Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the nonmoving party to relief." *White v. Kent Medical Center*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991).

The plaintiff has failed in its summary judgment showing. It had the burden to demonstrate that it is entitled to judgment as a matter of law and it has failed to do so. Voorhies has also presented issues of fact to the court that would further preclude summary judgment.

B. The Grower Agreement does not Contain Language to Pay Back Advances.

This issue relates to both assignments of error, issues 1 since one of the sides should prevail on this issue on its face. The issue is, simply, does the Grower Agreement set forth terms that Voorhies must pay Stadelman any deficiency in the difference between advancements and apple proceeds. The reason for quoting from the language of the Grower Agreement at length above was to demonstrate, undisputedly, that the Grower Agreement contains no such language that establishes any sort of requirement for Voorhies to pay back any short fall of funds advanced. Stadelman can cite to no such language. Voorhies cannot argue against language in the Agreement that does not exist.

With respect to contract interpretation, Washington has adopted the "context rule" in construing contract provisions. While extrinsic evidence is admissible to illuminate the meaning of what was

written, it is not admissible for the purpose of ascribing meaning that is not set forth in the written document.

Unfortunately, there has been much confusion over the implications of Berg.

In *Hollis*, we sought to clarify the meaning of *Berg*:

> Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation.
>
> During the past eight years, the rule announced in Berg has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis v. Garwall, Inc., 137 Wash.2d 683, 693, 974 P.2d 836 (1999) (citations omitted).

> **Since Berg, we have explained that surrounding circumstances and other extrinsic evidence are to be used "to determine the meaning of *specific words and terms used*" and not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word**." Id. at 695-96, 974 P.2d 836 (emphasis added).

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn. 2d 493, 502-03, 115 P.3d 262, 266-67 (2005)(emphasis added).

More specifically, it is not the function of the court to "create" the contract for the parties. Extrinsic evidence is not to be used to show what the parties intended to write, but did not.

> Our holding in *Berg* may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle,* 62 Wash.App. 593, 602, 815 P.2d 284 (1991). We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.,* 123 Wash.2d 678, 684, 871 P.2d 146 (1994). Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wash.2d 853, 855, 631 P.2d 366 (1981). We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wash.App. 634, 637, 745 P.2d 53 (1987). We do not interpret what was intended to be written but what was written.

Hearst Commc'ns 154 Wn. 2d at 503-04 (emphasis added).

With these standards in mind, Stadelman's claim for summary judgment must be judged as well as the Voorhies motion. It is undisputed that the parties executed a Grower Agreement, the terms

of which have been set forth above. Stadelman's conclusory assertions that money advanced was a "loan" should be viewed in the context of the standards set forth above. That concept may have been what Stadelman Fruit intended. However, that's not what the parties agreed to under the written terms of the Grower Agreement. That's not what the Grower Agreement states. Stadelman desires this Court to insert such language into the Grower Agreement. This the Court should not do.

The contractual provision quoted verbatim above, set forth that there is no "loan". Had Stadelman intended it to be so, the language of the Grower Agreement did have provisions for Stadelman to seek the execution of a promissory note. (CP 77). It is undisputed that no promissory note exists in this case. It is undisputed that Stadelman never asked Voorhies to do so.

The Grower Agreement is self-explanatory. Voorhies agreed to bring his fruit to Stadelman Fruit. Stadelman Fruit was to be paid for its storage, packing and selling costs. If Stadelman Fruit made "discretionary" advances to Voorhies, the amount of those advances would be offset from the returns due to Voorhies. (CP 76-77). It is

undisputed that such advances were made and it is further undisputed that every penny of Voorhies crop revenue was paid (offset) to Stadelman in order to offset those advances and charges. The contract worked just as it was written. There is no provision in the Grower Agreement that states, or, can even be remotely interpreted to even suggest that such a "repayment" of advances deficiency is included in the contract.

Stadelman may well ask this Court, why would it advance money to Voorhies without any requirement to be paid back. The answer is two-fold. First, that's the deal that the parties entered into. It is not the Court's function to create a new deal. Secondly, the maxim from the movie "All the President's Men" should be considered. The movie dealt with the Watergate break-in and when the source, "deep throat" was asked who would do such a thing as to break in to the democratic offices, the response was "follow the money." Follow the money. Why would Stadelman Fruit agree to advance funds for the acquisition of bins of fruit from a grower? Follow the money. Stadelman Fruit received over $1,000,000 for its efforts.

Wallace v. Kuehner, 111 Wn. App. 46 P.3d 823 (2002) is helpful in this analysis. In *Wallace*, a father advanced $100,000 to his daughter which was used to fund a portion of a development the daughter was involved in. While there was initial talk of a promissory note, such was never signed. The father did advance the $100,000. The lawsuit involved his claim to be repaid the money. *Wallace*, 111 Wn. App. at 812-13.

The Court found that the father had repudiated any intention to be repaid the money that had been advanced:

> **The constitution guarantees every person the liberty to do what is economically foolish as well as what may be generally considered prudent and wise.** *Douglas County Mem'l Hosp. Ass'n v. Newby*, 45 Wash.2d 784, 792, 278, P.2d 330 (1954). The evidence establishes that Wallace rejected the note and then gave in to his daughter's request for money. Wallace's statement to Brenda Kuehner after advancing the money stressed that should she lose the money, her share of any anticipated inheritance would be affected. The promissory note having been thrown away and that fact having been communicated to Brenda Kuehner, the $100,000 was at most an advance on Brenda Kuehner's inheritance. **There was no contract and no promise by the Kuehners to repay the $100,000.**

Wallace, 111 Wn. App. at 817-18 (emphasis added).

Stadelman had a perfectly legitimate financial reason for acquiring bins of apples from Voorhies to store, pack and sell. Stadelman made money doing so. It made a lot of money doing so. Even if that was not the case, that is not the court's function to re-write the parties' agreement. The issue here, pure and simple, is, "what does the Grower Agreement say." The Grower Agreement is clear in that it creates no "repayment" obligation. Stadelman's motion for summary judgment should have been denied and Voorhies is entitled to summary judgment dismissing Stadelman's claims since no issue exists as to the lack of any contractual provision in the Grower agreement to pay any advances back to Stadelman in addition to the offset provisions in the Grower Agreement. It was error for the trial court to order otherwise.

C. At the Very Least, Issues of Fact Exist as to the Accountings Rendered.

First, Stadelman's accounting has charges for "interest" on amounts that were advanced. This totals $37,750.67 from 2008 through 2011, prior to any lawsuit. (CP 98-99). There is no basis in the Grower Agreement for the imposition of interest. Voorhies would make a citation to the record on this issue, but, since there is no

provision in the Grower Agreement for interest, Voorhies cannot do so. The accounting provided by Stadelman is inaccurate. Stadelman was attempting to augment its perceived debt from Voorhies. The accounting further charges for "professional fees" at times prior to the initiation of the lawsuit. Again, the Grower Agreement does not provide for such charges. Stadelman was attempting to augment its perceived debt from Voorhies.

Secondly, all the Voorhies apple revenue was not accounted for to Voorhies. Compare the accounting that Voorhies was provided by Stadelman (CP 98-99) with the Grower return information that was provided to defendant through discovery. With respect to crop year 2008, Stadelman Fruit failed to credit three separate runs of fruit; 64 bins of Reds in Pool 4 for $8,820.08; 119 bins of reds in pool 19 for $9,989.77 and 129 bins of reds in Pool 19 for $7,204.89. (CP 372, 378, 380). In the accounting that was provided to Voorhies, Stadelman failed to account for $26,014.66 in revenue for crop year 2008. Crop year 2010 presents the same situation where Stadelman Fruit failed to account for 89 bins of reds for $11,896.11. (CP 426).

Finally, in crop year 2009, Voorhies was the only grower in pool 4 as accounted to by Stadelman. The Voorhies individual return shows a "net" of $25,954.75. The "pool return" of which Voorhies was the only grower, shows that net credited to the account was $61,662.89, a difference of $35,708.14. (CP 397-400).

Thus, without even trying hard and using only Stadelman's own documents, Voorhies can show inaccuracies totaling $73,618.91. If one includes the improper interest and attorney fees charges, the inaccuracies approach $120,000. Again, at the very least, issues of fact exist as to the accuracy of Stadelman's accounting.

D. The Mortgage Creates no Liability and, At the Very Least, Issues of Fact Exist.

This issue goes to both assignments of error, issue 2. The mortgage signed by Voorhies in this case creates no debt. By definition, a mortgage does not create a debt. Rather it is security for a valid, existing debt. *See John R. O'Reilly, Inc. v. Tillman*, 111 Wash. 594, 191 P.866 (1920). Thus, the mortgage at issue in this case does not create any debt. It simply secures any obligation to the extent that such obligation exists. As outlined above, no such debt is created. There is no valid existing debt to be secured.

The mortgage must also be further limited by the terms that are included therein. As noted above, the mortgage itself states that it is given:

> To secure the performance of each agreement of the mortgagor herein contained and the payment of all sums due Mortgagee in providing crop financing for the 2008 crop to be grown upon said premises, including all renewals, modifications, and extensions thereof, and also such additional sums as shall be agreed upon.

(CP 85).

The language of the mortgage clearly states that it is to secure obligations only with respect to the 2008 crop year. As is set forth in the Voorhies declaration, there was never any agreement or understanding that the mortgage would apply to subsequent crop years. (CP 361). Since it is undisputed that Voorhies has been paid sufficient funds to pay off the 2008 crop year advances, the mortgage should be deemed satisfied, even if the Grower Agreement could be deemed to create a "debt". These are independent issues and matter on priority issues. Stadelman should not be allowed to foreclose the mortgage, since no debt is secured and Voorhies never agreed to the extension for the mortgage beyond advances for crop year 2008 which have undisputedly been satisfied. Voorhies should have been granted

summary judgment on this issue and the Stadelman mortgage and foreclosure claims should have been denied.

E. The Consumer Protection Act Claim Should Likewise Go to the Jury since Issues of Fact are Presented.

The Consumer Protection Act (CPA) declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce". RCW 19.86.020. A private plaintiff must prove five elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *See Hangman Ridge Training Stables v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986). It would appear that Stadelman only questioned the first and third elements of the CPA claim.

The CPA does not define the term "deceptive act" but implicit in that term is the "understanding that the actor mispresented something of material importance." *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 166, 159 P.3d 10 (2007). In order to prove an unfair or deceptive act, the claimant need not prove intent to deceive nor

actual deception. *See Hangman Ridge,* 105 Wn.2d at 785-86. However, that is exactly the proof presented in this case.

Stadelman and Voorhies signed a contract with specific written terms included therein. Voorhies was to be provided with accurate accountings and nothing could be further from the truth as to what was provided by Stadelman to the tune of almost $120,000, as set forth above.

> The plaintiffs do not allege, and we do not hold, that it is deceptive for a tort claimant or the claimant's agent to correspond with an alleged tortfeasor and demand payment of a specific sum. But when a notice from a credit collection agency arrives with the message that it is a "Formal Collection Notice" for an "amount due", a recipient can reasonably be expected to perceive it as notice of a debt that must be paid. The increasingly urgent tone ("ATTENTION!") and message ("ACTIVITY PENDING TEN (10) days") suggests that the recipient's situation is becoming worse with each passing day when in fact there is no urgency. The basis of the alleged "amount due" is an unliquidated tort claim, not an unpaid consumer debt. Yet the notices from Credit do not even explain what the "amount due" is for or how it was calculated. There is no reference to the underlying accident, no supporting documentation, and no suggestion of a right to dispute the claim.

Stephens v. Omni Ins. Co_, 138 Wash. App. 151, 167-68, 159 P.3d 10, 19 (2007), *affd sub nom. Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, 204 P.3d 885 (2009).

This is not a "per se" CPA violation case. However, the issue presented is, as set forth above, whether the inaccurate accountings that Voorhies was given were unfair or deceptive acts. The case law as cited above states that such is the case. Voorhies also testified that he had lined up another apple packer to pay off Stadelman so that he could take his apples to that packer. (CP 361-62). Had Voorhies been given an accurate accounting, that amount would have been significantly less. By its actions and omissions, at the very least, issues of fact exist as to whether Stadelman's accounting practices were unfair or deceptive. Summary judgment for Stadelman was not appropriate.

The second element addressed is that the act or practice need impact the public interest. This is an issue of fact to be determined by the trier of fact. *See Stephens*, 138 Wn. App. at 177. The trier of fact is to consider whether the actions injured other persons, or had or has the capacity to injure other persons. *See* RCW 19.86.093.

Ultimately, "it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a

factual pattern from a private dispute to one that affects the public interest." *Stephens*, 138 Wn. App. at 178.

The evidence does create issues of fact in this regard. Stadelman's inaccurate accountings had the capacity to injure others in that other growers could have been subject to the same inaccuracies and charges as a pattern of conduct. Additionally, Monson Fruit Co. could well have derived the Voorhies revenue for storing and packing had an accurate accounting been provided. Issues of fact exist making summary judgment inappropriate.

Voorhies has put forth evidence as to the applicable factors to be considered on the issue of public interest impact. If Stadelman engaged in practices such as done herein, the likelihood that additional defendants may be harmed is self evident. At the very least, Voorhies has created an issue of fact to be submitted to the trier of fact and summary judgment is inappropriate. The trial court erred in holding otherwise.

F. The Independent Duty Doctrine Does Not Bar Voorhies' Claims.

Finally, Stadelman asserted that the "Independent Duty Doctrine" bars the Voorhies' negligence claim. Such is not the case.

Under this rule, a tort claim can be asserted if the injury is remediable in tort because it arising independently of the terms of the contract. See *Eastwood v. Horse Harbor Found., Inc.,* 170 Wn.2d 380, 389 241 P.3 d 1256 (2010). The first step is to review the contract to see what duties are imposed to see if a duty might arise "independently" of the contract. See *Donatelli v. D.R. Strong Consulting Engineers, Inc.,* 179 Wn.2d 84, 92, 312 P.3d 620 (2013).

The Grower Agreement is in the record. It does reflect that Plaintiff will adhere to customs and standards in the industry. That is nothing more than a tort standard to do what is "reasonable" in the industry. *See Donatelli*, 179 Wn.2d at 92-93. If the court must assess the scope of the duties assumed under the contract, summary judgment is not appropriate. *See Donatelli*, 179 Wn.2d at 92. The Court would be required to ascertain what the customs and standards in the industry would be. This would involve issues of fact which the court in *Donatelli* found would not be appropriate to be decided on summary judgment. Accordingly, summary judgment should have been denied and the trial court erred in holding otherwise.

G. Voorhies is Entitled to an Award of Reasonable Attorney's Fees.

Pursuant to RAP 18.1, Voorhies requests an award of attorney's fees in this case. Both the mortgage and the Grower Agreement contain attorney fees provisions for the prevailing party in an action thereon. (CP 22, "In the event of a suit or action to enforce this Agreement, the prevailing party shall be entitled to be awarded such reasonable attorney's fees and litigation costs . . . ."), (CP 91, "In any action to foreclose this mortgage . . . the mortgagor agrees to pay a reasonable sum as attorney's fees and all costs and expenses in connection with such suit.") If the trial court is reversed and the Voorhies motions granted, Voorhies is entitled to such an award on both issues and will comply with RAP rules as to submitting documentation.

V. CONCLUSION

For the reasons set forth above, the trial court's order should be reversed and Voorhies' motion for summary judgment should be granted. There is no creation of a debt in this case. The parties entered into a contract and that contract has been fulfilled. Additionally, the mortgage in this case should be dismissed and all claims associated

therewith should be dismissed since it is undisputed that it only applied to crop year 2008 and proceeds have been sufficient to pay that debt. Issues of fact exist as to the CPA and negligence claims that make summary judgment inappropriate. Those decisions should be reversed and the case remanded back for trial. Voorhies is further entitled to an award of attorney's fees.

DATED this 17th day of July, 2017.

HALVERSON | NORTHWEST Law Group P.C.
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By: _____
J. Jay Carroll, WSBA No. 17424

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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July 17, 2017 - 4:01 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
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Appellate Court Case Title:	Stadleman Fruit, LLC v Jim D. Voorhies, et al
Superior Court Case Number:	11-2-02654-9

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